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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

BRANYAN & PETERSON, INC.,
A Tennessee Corporation;
FRED J. VANDEMARK COMPANY,
A Tennessee Corporation;
AND P. H. WILLIAMS, an Individual
Petitioners,

vs.

HORACE E. THOMPSON,
Commissioner of Revenues
For The State of Arkansas,
Respondent.

NO. 338

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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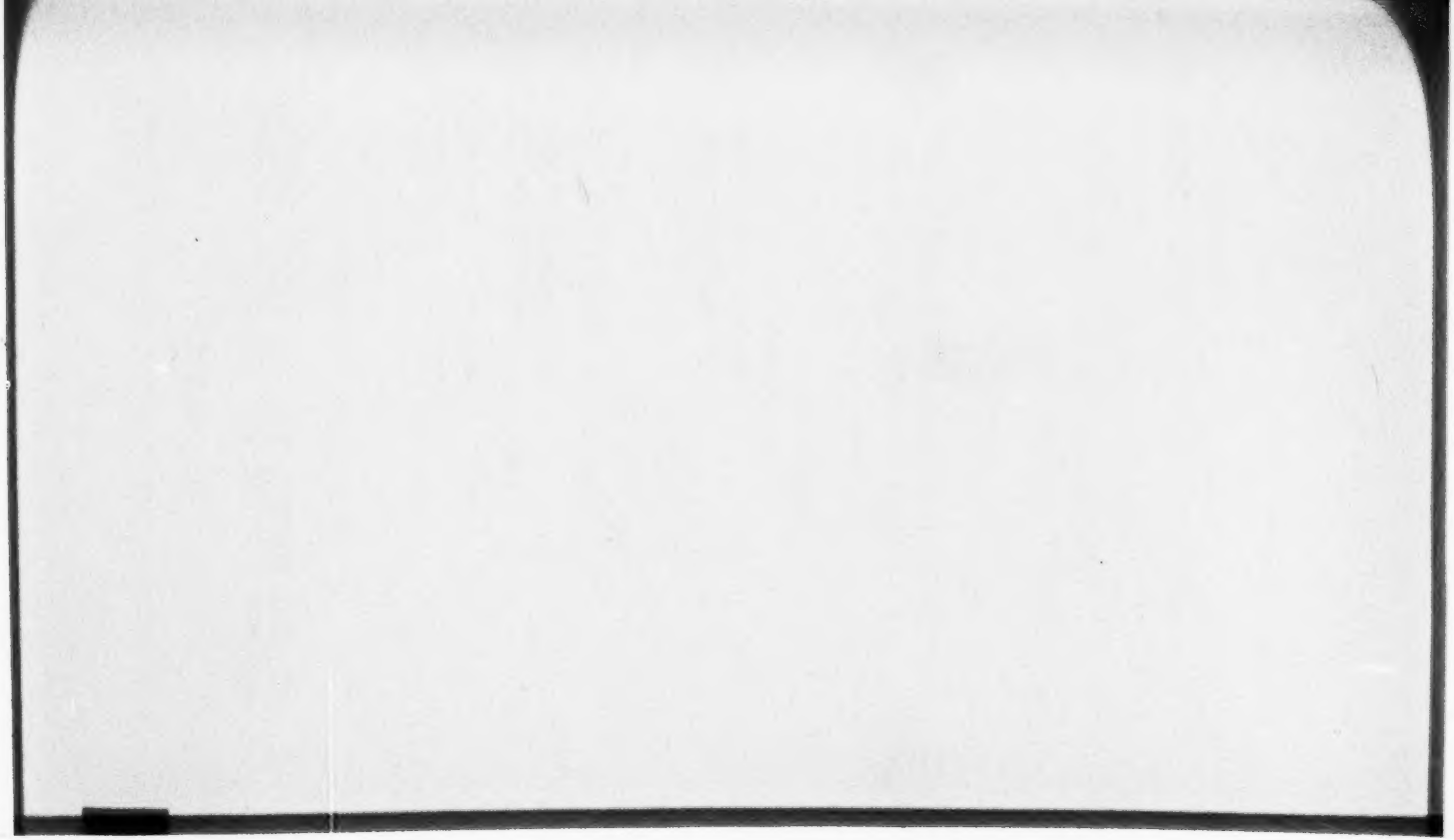

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vs.

HORACE E. THOMPSON,
Commissioner of Revenues
For The State of Arkansas
Respondent.

NO.....

To the Honorable Earl R. Warren, Chief Justice, and the Honorable Associate Justice, of the Supreme Court of the United States:

The petitioners, Fred J. Vandemark Company, a Tennessee corporation; Branyan & Peterson, Inc., a Tennessee corporation; and P. H. Williams, an individual, respectfully petition that Writs of Certiorari be issued in these causes to the Supreme Court of Arkansas, and in support thereof respectfully submit the following matters:

The Chancery Court of Pulaski County rendered its decree in favor of petitioners but no written opinion.

The opinion of the Supreme Court of Arkansas is not yet reported officially but is contained in the Appendix hereto (Page 1a).

Statement of the Grounds on Which the Jurisdiction of This Court is Invoked.

The Supreme Court of Arkansas delivered its opinion in each of the three cases here involved on May 24, 1954, and on the same date rendered and entered its decree in conformity therewith. Petition for Rehearing was filed on June 4, 1954, and on June 21, 1954, the Court entered the following order:

"Rehearing Petitions Denied: The petitions for rehearing in the following causes are by the court denied: 208, 209 and 211. Horace E. Thompson, Commr. vs. P. H. Williams, et al; rehearing denied in each case."

The Statutory provision believed to confer on this court jurisdiction to review the above decree by writ of certiorari is Section 28 U.S.C.A. 1257, subsection 3, June 25, 1948, C. 646, 62 Stat. 929.

Questions Presented for Review

(a) Does the requirement that the Memphis, Tennessee, vendor collect the tax levied by Act 487 of the Acts of the General Assembly of Arkansas, 1949, violate the Due Process Clause of the Constitution of the United States inasmuch as the sole activity of said non-resident vendors in Arkansas is that of soliciting agents?

(b) Does the requirement that the Memphis, Tennessee, vendor collect the tax levied by Act 487 of the Acts

of the General Assembly of Arkansas, 1949, violate the Commerce Clause of the Constitution of the United States inasmuch as the sole activity of said non-resident vendors in Arkansas is that of soliciting agents?

(c) Does the requirement that Fred J. Vandemark Inc., collect the tax levied by Act 487 of the Acts of the General Assembly of Arkansas, 1949, violate the 14th Amendment of the United States Constitution in that petitioner is required to collect the tax on sales specifically found to be exempt from the provisions of the Act by the lower court? The question was ignored by the Arkansas Supreme Court although the oversight was called to its attention in the Motion for Rehearing.

Pertinent Constitutional Provisions and Statutes:

Sec. 1, Amendment 14, Constitution of the United States.

Subsection 3, Section 8 of Article 1 of Constitution of the United States.

Sec. 5 of Act 487 of Acts of General Assembly of Arkansas, 1949, page 1376.

Sec. 6 (d) of Act 487 of Acts of General Assembly of Arkansas, 1949, page 1377.

Sec. 8 of Act 487 of Acts of General Assembly of Arkansas, 1949, page 1378.

Sec. 1, Public Law 509, 80th Congress, approved May 3, 1948.

The above are set forth in the appendix hereto. (Pages 18a-21a).

Statement of the Case

The cases were tried on stipulation of facts which are as follows: Each of the three petitioners are residents of Memphis, Tennessee, and are engaged in business there. They each employ sales representatives who travel in Arkansas and solicit orders from residents of Arkansas subject to acceptance in Tennessee. If the orders are accepted they are shipped in interstate commerce to the purchaser in Arkansas; Branyan-Peterson, Inc., by common carrier f.o.b. Memphis, Tennessee; Fred J. Vandemark Company by common carrier, f.o.b. Memphis, Tennessee; and P. H. Williams by his own conveyance. The offer to purchase, the acceptance, and delivery of the merchandise to the common carrier is consummated in Memphis, Tennessee, where the consideration for the purchase price is paid. No Tennessee Sales Tax is collected on said sales. None of petitioners have qualified to do business in Arkansas, nor do they maintain a place of business or warehouse in Arkansas. Vandemark has a resident soliciting agent in Little Rock, Arkansas, operating under a written contract (Vandemark Record, pages 9-12, inc.). In the Vandemark case two sales were involved, both made as above set forth, but one was a sale of a lifting machine to Alma Canning Company, which sale was claimed to be exempt under the provisions of Section 6 (d) of the taxing act in that the purchaser is a processor.

Three separate records are filed in this court but by direction of the clerk of this court only one petition for all three petitioners is filed herein.

The Federal questions were raised and preserved throughout the proceedings in the following manner:

The tax involved in each of the suits was paid under written protest in conformity with the taxing act, and paragraphs 3 and 4 of said written protest are as follows:

> "(3) That if said tax act be construed to cover sales herein involved it would create a burden on interstate commerce and be in violation of Section 9, Article I, of the Constitution of the United States, and further would deprive said Fred J. Vandemark Company of its property in violation of the 14th Amendment to the Constitution of the United States.
>
> "(4) That inasmuch as the said Fred J. Vandemark Company does not maintain an office or place of business within the State of Arkansas, or a resident agent therein, and is not qualified to do business in the State, the said Commissioner of Revenues is without power or authority to compel the said Vandemark Company, acting beyond the territorial limits of the State, to become a collector of taxes for the State."

(See Vandemark Record, pages 7 and 8; Branyan & Peterson Record, pages 8 and 9; and Williams Record, pages 8 and 9.)

The above Federal questions were renewed in substantially the same language in the Complaint. (See Vandemark Record, pages 3-6; Branyan & Peterson Record, pages 4-6; Williams Record, pages 4-7.) The decree of the Pulaski County Chancery Court upheld petitioners' contentions in substantially the same language. (See Vandemark Record, pages 17-20; Branyan & Peterson Record, pages 13-14a; Williams Record, pages 13-15.) The questions were further preserved in the Petition for Rehearing (see Vandemark Record, pages 37-38; Branyan-Peterson Record, pages 31-32; Williams Record, pages 32-33), which motion was by the Arkansas

Supreme Court denied. (See Vandemark Record, page 39; Branyan-Peterson Record, page 33; Williams Record, page 34.)

Argument in Support of Petition

The manner in which Branyan & Peterson conducts its business insofar as Arkansas residents are concerned is identical with that employed by Reichman-Crosby and J. E. Dilworth Company in the case reported in 205 Arkansas 780 171 SW 2nd 62. The sole difference is that in the case at bar we are concerned with the Use Tax, and there the Sales Tax was involved.

In the Dilworth-Reichman-Crosby case, at page 786, the Arkansas Supreme Court said:

> "The fact that appellees have traveling salesmen who come into this state to solicit orders is not sufficient to take the transaction out of interstate commerce."

This case was affirmed in this court in *McLeod vs. J. E. Dilworth Co.*, 322 U. S. 327. Therefore the transactions on which the tax is based are in interstate commerce and the non-resident vendor cannot be made to collect the Sales Tax. The question here squarely presented is whether a Use Tax under identical circumstances is also a burden on interstate commerce.

We earnestly submit that the activity of the non-resident vendor in the State, and not the nature of the tax involved, is the proper test for determining the obligation of the non-resident to collect the tax.

In *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218, the Court said:

> "This court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served, and in which it is bound to appear when a proper agent has been served with process."

The proposition is succinctly stated in 41 Mich. L. Rev. 553, and is replete with citation of authority as follows:

> "It is well established that a corporation must be 'doing business' within a state before it is amenable to service of process, but the nature and extent of economic activity which constitutes 'doing business' is by no means so clear. Because of the great variety of possible arrangements under which business may be carried on, it is difficult to formulate any all-inclusive rule applicable to the diverse fact situations presented to the courts; but running through the decisions seems to be the general principle that the business must be of such an extent and character as to warrant the inference that the corporation is present within the state with some measure of continuity and permanence. While there is no precise measure of the amount and kind of business necessary to constitute 'doing business' for jurisdictional purposes, neither occasional isolated transactions, nor mere solicitation of orders within the state by an agent, nor advertising, exhibiting, and demonstrating products to stimulate consumer demand, nor

> holding of stock in subsidiary corporations, nor temporary presence of officers or directors of the corporation within the state of itself will establish corporate presence. Rather it is the combination of local activities conducted by such foreign corporation . . . . . which becomes determinative of the jurisdictional question."

Article 1, Section 8, of the United States Constitution, specifically grants to Congress the power "to regulate Commerce with foreign nations and among the several States." Therefore, it appears pertinent as to what attitude Congress itself has taken on what constitutes "doing business" by a foreign corporation so as to subject it to the taxing power of a state.

In 1948, Congress amended the Business Franchise Tax Act for the District of Columbia (see Public Law 509, 80th Congress; appendix 20a) to specifically spell out what does *not* constitute "doing business" in the District of Columbia for purposes of taxation. That Act provided that foreign corporations which do not "physically have or maintain an office, warehouse or other place of business in the District" are not subject to the District of Columbia tax.

The case which incited the idea that a non-resident in these circumstances could legally be made a tax collector is *General Trading Co. v. State Tax Commission,* 322 U. S. 335. In this case the factual situation was similar to that in Dilworth-Reichman-Crosby case, except that the Iowa Supreme Court held that under Iowa law, General Trading Company was a "retailer maintaining a place of business in this state." That this single fact was controlling is evidenced by the majority opinion written by Justice Frankfurter, who states:

> "The application by the Court of its local laws and the facts on which it founded its judgment are of course controlling here."

Despite the Iowa Court's holding that under the Iowa law General Trading Company was a "retailer maintaining a place of business in this state," Mr. Justice Jackson pointed out that the facts showed it was not and that, in effect, the Iowa Legislature could not, by defining a retailer, supersede the interstate commerce decisions.

The Supreme Court of Mississippi, in the case of *A. H. Stone, Chairman State Tax Commission v. Reichman-Crosby Co.*, 204 Miss. 122, 37 So. (2d) 22 (1948) so construed the *General Trading Company* case, and the U. S. Supreme Court denied certiorari, 339 U. S. 917, thus tacitly, at least, confirming this construction.

In that case, the Mississippi Court ruled that the State Court had the power to determine whether the non-resident vendor was doing business in the state so as to come within the rule of the General Trading Company case, any declarations in the taxing act to the contrary notwithstanding. The Court stated that had it been confronted with the problem in the General Trading Company case, Mississippi law,

> ". . . . . would have required that we should hold the question as to what constitutes doing business in the state, territorial jurisdiction, and due process of law, to be a judicial one, and that we were not bound by a legislative declaration or definition as to what would constitute doing business, territorial jurisdiction, or due process unless such declaration or definition was sanctioned or authorized by constitutional limitations." 37 So. (2d), at 26.

In *Creamery Package Manufacturing Co. v. State Board of Equalization*, 62 Wyo. 265, 166 P. 2d 952 (1946), the General Trading Company case was distinguished by holding that even though the Iowa court had held there that the General Trading Company was doing business in Iowa, the Wyoming court was not bound to hold that an Illinois corporation which sold goods in Wyoming and whose sole contact with Wyoming was drummers traveling through the state was doing business in Wyoming so that sales to Wyoming residents could be taxed under a USE TAX law. The court stated:

> "We think, in short, that *we are not warranted in holding that the plaintiff in this case has a place of business in this state, when in fact it has none*, or that it can be compelled under present authorities to become an agent of this state in collecting the Use Tax involved herein." 166 p. 2d, at 960. (Emphasis added.)

For a similar holding, based on an interpretation of a Michigan statute, but rendered prior to the General Trading Company case, see *J. B. Simpson, Inc., v. Gundry*, 297 Mich. 403, 298 N. W. 81 (1941), certiorari denied *sub nom. Brown v. J. B. Simpson, Inc.*, 314 U. S. 674.

An eminent text writer in analyzing the problem states:

> "If it were a point of distinction in the sales tax cases whether the extrastate vendor has an established place of business within the buyer's state, it should equally be a point of distinction in deciding whether an extrastate seller may be made a collector of a use tax. So also if the termination of the seller's activity and responsibility at the moment of shipment was a factor in saving him from paying a sales tax in the state of delivery, it should be a factor in

determining whether he may be made a collector of a use tax for the state of delivery." Powell, Sales and Use Taxes; Collection from Absentee Vendor, 57 Harv. L. Rev. 1086, 1094 (1944).

A recent pronouncement of this Court on the question is *Memphis Steam Laundry Cleaner v. Stone,* 342 U. S. 389, (1952), Mr. Chief Justice Vinson saying:

> "In the long line of 'drummer' cases, beginning with *Robbins v. Shelby County Taxing District* 1887, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce. As the Court noted last term in a case involving door-to-door solicitation of interstate business, 'Interstate commerce itself knocks on the local door'."

See also *James v. United Artists Corp.,* 305 U. S. 410.

In *McWhorter v. Anchor Serum Co.,* 72 F. Supp. 437, the defendant employed a salesman who procured orders which were sent to the company in Missouri, and they were there filled and the goods shipped directly to the purchaser in Arkansas. Service was had on the defendant under Act No. 347 of the Acts of the General Assembly of Arkansas, 1947. In granting a motion to quash the service, Judge Miller said:

> "Before any state can subject a foreign corporation to the jurisdiction of that state, the corporation must have expressly consented to such jurisdiction or must have done sufficient acts to constitute a submission to such jurisdiction. *International Harvester*

Company of America v. Commonwealth of Kentucky, 1914, 234 U. S. 579, 34 S. Ct. 944, 58 L. ed. 1479; Restatement, Conflict of Laws, Sec. 89. In the case of foreign corporations these acts normally take the form of 'doing business.' It may be said that the 'doing business' by a foreign corporation is the minimum of acts that will subject that corporation to the jurisdiction of a state. Therefore, if a state statute goes below this minimum in granting the state jurisdiction, that statute is unconstitutional as a violation of due process of law.

"The often cited test for 'doing business,' as expressed by Mr. Justice Brandeis of the United States Supreme Court, is: 'A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there.' *Philadelphia & Reading Railway Company v. McKibbin,* 1917, 243 U. S. 274, 37 S. Ct. 280, 61 L. ed. 710. In factual situations similar to the one before the court the decisions have set out two categories: (1) the mere soliciting agent, and (2) the soliciting agent plus. It may be generally stated that if the corporation maintains a mere soliciting agent in the state, that corporation is not 'doing business' for purposes of service under an appropriate state statute. *International Harvester Company of America v. Commonwealth of Kentucky, supra; Roark v. American Distilling Co.,* 8 Cir., 1938, 97 F. 2d 297; *Hinchcliffe Motors, Inc. v. Willys-Overland Motors, Inc.,* D. C. Mass., 1939, 30 F. Supp. 580; *H. J. Heinz Co. v. Duke,* 1938, 196 Ark. 180, 116 S. W. 2d 1039, 146 A. L. R. 949. Those cases wherein the corporation was found to be 'doing business' have factual situations in which the agent in the state does more than merely solicit orders."

It is not argued herein that the requirements for sub-

stituted service of process should be the same as the requisite facts for legislative jurisdiction to require a non-resident vendor to collect a tax. On the other hand, it seems quite reasonable that the factual circumstances which will justify a court in upholding substituted service on a non-resident should be the outer limit of circumstances which would allow a state to tax a non-resident, or allow a state to require a non-resident to collect its taxes for it. The Constitutional inhibitions on substituted service of process are based wholly on the due process clause. The interstate commerce clause is an additional barrier to taxation or requiring collection of taxes as a condition to doing business in the state. 23 *Am. Jur., Foreign Corporations,* Sec. 381.

In *Miller Bros. Co. v. State of Maryland,* 74 S. Ct. 539, opinion April 15, 1954, the precise question here presented was posed and answered in the following language:

> "In accordance with the principles of earlier cases, it was recently settled that Maryland could not have reached this Delaware vendor with a sales tax on these sales. *McLeod v. J. E. Dilworth Co.,* 322 U. S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304. Can she then make the same Delaware sales a basis for imposing on the vendor liability for use taxes due from her own inhabitants? It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself."

It appears that the decision here sought to be reviewed makes the "strange law" above referred to, as Branyan & Peterson, Inc., operates identically as does J. E. Dilworth Company and under that decision are exempt from collecting the Arkansas Gross Receipts Tax, which

by its terms is a tax on the vendor. The decision here sought to be reviewed makes Branyan & Peterson, Inc., liable for the collection of the Use Tax, which by its terms is laid on other persons, the Arkansas purchaser!

Act 487 of the Acts of the General Assembly of Arkansas, 1949, does not fix any liability on plaintiffs for the payment of the "Use Tax" therein provided for. To the very contrary, under the terms and provisions of said Act the tax is levied upon, and shall be collected from, every person using or consuming, within the State, tangible personal property purchased for storage, use or consumption in the State. Moreover, the tax so laid does not apply with respect to the storage, use or consumption of any such personal property purchased, produced or manufactured outside of the State of Arkansas until the transportation of it has finally come to rest within the State.

Section 5 of the Act begins:

> "There is hereby levied and *there shall be collected* from every person in this State a tax or excise *for the privilege of storing, using or consuming, within the State, any article* of tangible personal property, after the passage and approval of this Act, *purchased for storage, use or consumption in this State,* at the rate of two (2%) per cent of the sales price of such property. *This tax will not apply with respect to storage, use or consumption of any article* of tangible personal property purchased, produced or manufactured *outside this State until the transportation of such article has finally come to rest within this State or until such article has become commingled with the general mass of property of this State.*" (Emphasis added.)

Section 8 is as follows:

> "Every vendor making a sale of tangible personal property directly or indirectly for the purpose of storage, use or consumption in this State shall collect from the purchaser two per cent (2%) of the sales price, and give to the purchaser a receipt therefor. The required amount of tax collected by the vendor from the purchaser shall be displayed separately upon the check, sales slip, bill, receipt or other evidence of sale."

Thus it is apparent that the Commissioner would have petitioners collect a tax at the time of the sale which under the very plain language of the Act is not due.

As said by the Court in *Stone v. Reichman-Crosby,* 43 So. 2d 184, certiorari denied 339 U. S. 917:

> "Furthermore, the tax here is for the use or storage, and so forth, in Mississippi, and is not a Sales Tax in Tennessee, which manifestly our Legislature would not attempt. However, there can be no tax on use in Mississippi until there is use in Mississippi, and until the purchased property attains that status the tax could not be for a use that had not occurred, and it would be simply a tax by Mississippi on sales in Tennessee. This would add to the unconstitutionality of the Act, as we see it."

The celebrated case of *Robbins v. Shelby County Taxing District,* 120 U. S. 489 (1887), is a landmark decision and probably the most cited one of cases involving interstate commerce taxation. It was cited with approval in 1952 in *Memphis Steam Laundry v. Stone,* 342 U. S. 389. Mr. Justice Bradley, in speaking for the Court, said:

> "When goods are sent from one state to another

> for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them *as* goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way, as other goods are. *Brown v. Houston, qua supra; Machine Co. v. Gage,* 100 U. S. 676. *But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself.*"

It is therefore submitted that this enactment was not intended by the Arkansas Legislature to require the out-of-state vendor to collect the tax before it accrued by virtue of the buyer's use of the goods sold. The contrary intention would be inherently unreasonable. It is entirely conceivable that the tax might never accrue, even though the parties contemplated that the goods were to be used in Arkansas at the time of the transaction. Thus, the buyer might have intended the goods to be consigned to Arkansas, but later after the tax had been collected direct the shipment in transit changed to a third state. Would the seller be obligated to return the tax collected to the buyer? What of the case where the buyer had not decided whether or not to have the goods delivered to Arkansas when he purchased them? Would the seller be obligated to collect the tax anyway? Thus, if a planter operated plantations in both Louisiana and Arkansas, and purchased consumption goods in Tennessee for delivery to a common carrier's warehouse pending consignee's shipping orders to one or the other of his two plantations, would the seller be obligated to tax the transaction for Louisiana, for Arkansas, for both, or would he be required to collect the tax and hold it in

trust while the buyer made up his mind as to which state he would send the goods? And what of the lying buyers? Is the seller to be liable to the State of Arkansas for failure to collect a tax from a buyer who deliberately and falsely states that he is going to put them to an exempted use there?

These problems do not exhaust the list of enforcement problems facing an interpretation of the Act to the effect that the tax must be collected before it accrues. Cf. *Broadacres Dairy v. Evans,* 246 S. W. 2d 78 (Tenn. 1952). Yet they indicate the inherent instability of such an interpretation. The taxable event is not the *contemplated use* in Arkansas, but the *actual use.*

Even if it be granted that the Arkansas Legislature intended by this Act, to require the collection of the tax by the out-of-state vendor before it accrues, it is submitted that such an enactment is unconstitutional, in that it fails to give the equal protection of the laws to the out-of-state vendor that is accorded to the resident vendor who must collect the Sales Tax. The resident vendor is in a better position to know his buyer and to ascertain whether the buyer is going to put the goods to a use which would be taxable. He takes less risk, then, than the out-of-state vendor who must take the buyer's own word, and frequently nothing more, that the goods will not be so used that their use would be taxed. Thus, the non-resident vendor is required to give credit to the buyer and to pursue him to another state in order to recover the debt if it is later established that the use was taxable. Compare the statement in the opinion in the first case of *Reichman-Crosby v. Stone,* 37 So. 2nd at 24, 25, Certiorari denied 339 U. S. 917:

> "* * * the non-resident seller is required to become a surety or be responsible for the collection of the tax before any liability therefor has become fixed against the purchaser, and is not in a position to protect himself in any manner available to a local retail merchant in the state, who is able to collect the tax when the sale is consummated by placing the goods back on the shelf if the purchaser fails to pay a two per cent sales tax . . . * * * It is unnecessary that we emphasize these contentions, because merely to state them is to show their correctness . . . . ."

Another way of looking at the transaction is that of a suretyship transaction. The vendor is surety for the buyer's obligation to pay a tax on his use of the property, and must pay such a tax if the buyer defaults, i. e., the buyer's liability is primary and the vendor's liability is secondary only. Yet, the situation presented by the interpretation contended for by the Commissioner is not typical of suretyship obligations at common law. One of the fundamental principles of the suretyship is that the surety's obligation is measured by and can be no greater than that of the principal debtor. *Peay. v. Southern Surety Co.*, 141 Ark. 265, 273. And here the surety (the vendor) is required to become liable to the creditor (the State) before the "principal debtor" has even become obligated to the creditor. Cf. *Reichman-Crosby Co. v. Stone,* 204 Miss. 122, 37 So. 2d 24-25 (1948), certiorari denied 339 U. S. 917.

Mr. Justice Jackson in *Miller Bros. Co. vs. State of Maryland,* 74 Sup. Ct. 539, speaking for this court stated:

> "The practical and legal effect of the Maryland statute as it has been applied to this Delaware vendor is to make the vendor liable for a use tax due

from the purchaser. In economic consequence, it is identical with making him pay a sales tax. The liability arises only because of a Delaware sale and is measured by its proceeds. But at the time of the sale, no one is liable for a Maryland use tax. That liability arises only upon importation of the merchandise to the taxing state, an event which occurs after the sale is complete and one as to which the vendor may have no control or even knowledge, at least as to merchandise carried away by the buyer. The consequence is that liability against the Delaware vendor is predicated upon use of the goods in another state and by another person. We do not understand the State to contend that it could lay a use tax upon mere possession of goods in transit by a carrier or vendor upon entering the State, *nor do we see how such a tax could be consistent with the Commerce Clause.*"

In the Vandemark case there were two sales involved, one made on an order solicited by Bigelow Robinson to the Safeway Stores, at Little Rock, Arkansas, the consideration for said sale being the sum of $2,714.50. The other sale was on October 16, 1951, to the Alma Canning Company, Alma, Arkansas, made through a traveling representative, the consideration being $3,719.00. Vandemark specifically pleaded this sale as exempt under Section 6 (d) of the Use Tax Act and the lower court in its decree found it exempt.

The opinion of the Arkansas Supreme Court completely ignored this portion of the case even though the apparent oversight was specifically called to its attention on the Petition for Rehearing (Record page 37-38). Petitioner Vandemark paid the Use Tax and penalty under written protest (Record page 7-8) setting forth that such exaction was violative of both the Due Process and Commerce Clauses of the United States Constitu-

tion. Suit was filed to recover said money and alleged that said sale was exempt and plead the Due Process and Commerce Clauses (Record page 5). The lower court held the sale to the Alma Canning Company to be exempt (Record page 19) under the provision of Section 6 (d) of the Taxing Act which is as follows:

> "There are hereby specifically exempted from the taxes levied in this Act: * * *
>
> "Tangible personal property used by manufacturers or processors or distributors for further processing, compounding or manufacturing; tangible personal property used for repair, replacement, or expansion of existing manufacturing or processing facilities or in creating new manufacturing or processing facilities, and tangible personal property used in the repair, replacement, or expansion of existing, or in the creation of new, facilities used for public transmission, communication, or transporation purposes."

The Arkansas Supreme Court reversed the lower court and remanded the case to said court with directions to enter a decree in favor of the Commissioner (Record page 22). Petition for Rehearing was filed calling the court's attention to this oversight or failure to rule on this point. (Record page 37). The petition was denied without further comment (Record page 39). We submit that this decision requires the non-resident vendor to collect the tax on an exempt sale; and which under the provisions of the act could not be required of a resident vendor and plainly denies the petitioner Vandemark of its property without Due Process and denies it equal protection of the laws.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. DAGGETT,
Counsel for Petitioners
Marianna, Arkansas

CHARLES P. COBB, Of Counsel

Dated September 2, 1954.

APPENDIX A

SUPREME COURT OF ARKANSAS
No. 207-211, Inc.

HORACE E. THOMPSON, as Commissioner of Revenues,

Appellant,

vs.

RHODES-JENNINGS FURN. CO., et al,

Appellees.

(Five cases)

Opinion Delivered May 24, 1954

Appeal from Pulaski Chancery Court

In Cases 207 and 210 the Decree is Affirmed;

In Cases 208, 209 and 211, the Decree is Reversed and Remanded with Directions.

ED. F. McFADDIN, Associate Justice

Five separate cases were filed in the Pulaski Chancery Court against the Commissioner of Revenues of the State of Arkansas. In each case, the plaintiff was a Tennessee corporation or individual, seeking to prevent the said Commissioner from claiming a tax against such plaintiff. Two of the cases (numbered 207 and 210 in this Court) involved the Arkansas Gross Receipts Tax, being Act 386 of 1941 (Sec. 84-1901 et seq. Ark. Stats.), which is a Sales Tax. The other three cases (numbered 209, 211 and 208 in this Court) involved the Arkansas Compensation Tax[1], being Act 487 of 1949 (Sec. 84-3101 Ark. Stats. Pocket Supplement), which is a Use Tax. In each case, the Commissioner of Revenues of the State

[1]In the Act itself, Section 1 says "Compensation Tax." In Sec. 84-3101 Ark. Stats. says "Compensating Tax."

of Arkansas (hereinafter called "Commissioner"[2]) had assessed a tax against the Tennessee firm which had been paid under protest as a prerequisite to the filing of the suit in the Pulaski Chancery Court to recover the amount paid. Such procedure is established by Legislative enactment.[3]

The five cases were never consolidated, but each was separately tried, on its own stipulated facts. In each case, the Chancery decree was adverse to the Commissioner, and he has appealed. For convenience, we allowed the five cases to be jointly briefed, although they were never consolidated. The cases were submitted to this Court in October, 1953; but, by agreement of all parties, we delayed our decision until the Supreme Court of the United States delivered its opinion in the case of *Miller Bros. v. Maryland,* which case involved the Maryland Use Tax, sustained by the Court of Appeals of Maryland in 95 Atl. 2d 286. The decision of the Supreme Court of the United States, reversing the Maryland Court, was delivered April 5, 1954. See *Miller Bros. v. Maryland,*

U. S. , 98 L. Ed. (Advance) 470, 74 S. Ct. 535. So each of the five cases pending in this Court is now ready for our decision. We have studied most carefully the decision of the Supreme Court of the United States in *Miller Bros. v. Maryland;* and, as a result, we find that two of the present cases must be affirmed; and three of the cases must be reversed. It thus becomes necessary for us to give the particular facts in each of

[2]When the cases were originally filed, Horace E. Thompson was Commissioner of Revenues, but since then, Vance Scurlock is Commissioner. However, we continue to style the cases as "Thompson, Commissioner."

[3]See Sec. 10 of Act 386 of 1947 for Sales Tax cases; and Sec. 20 of Act 487 of 1949 for Use Tax cases. The Use Tax Act says "Circuit Court," but no objection to forum has been made here.

the five cases; and this will, in effect, be a separate decision on each of the cases, but all contained in this one opinion.

Case No. 207

THOMPSON, Commissioner

v.

RHODES-JENNINGS FURNITURE CO.

In this case, the Commissioner claims that Rhodes-Jennings is liable to the State for the Gross Receipts Tax, under Act 386 of 1941 (Sec. 84-1901 et seq. Ark. Stats.) because of sales of merchandise made by Rhodes-Jennings to residents of Arkansas. The facts were stipulated, as follows:

> "Plaintiff is a corporation organized under the laws of the State of Tennessee. It has not qualified to do business in Arkansas, nor does it own or maintain a place of business in this state, neither does it have agents or drummers who solicit business herein.
>
> "Plaintiff has heretofore sold merchandise to residents of Arkansas, all of such sales being made in the following manner:
>
> "(a) Residents of Arkansas come in person to the place of business conducted by plaintiff in Memphis, Tennessee, and purchase and pay the consideration for certain items of merchandise, and
>
> "(b) Residents of Arkansas use the Federal postal service or interstate telephone or telegraph service and offer to purchase from plaintiff such

items of merchandise, and such offers are accepted or rejected by defendant in Memphis, Tennessee.

"That in either or all of such transactions so had, the offer to buy such merchandise so made by the resident of Arkansas, and the acceptance thereof by plaintiff, was made in Tennessee, and the consideration therefor was paid in Tennessee. Thereafter, plaintiff delivered the merchandise so purchased without additional charge to the home or place of business of the Arkansas resident by its truck. Plaintiff has an established policy generally known to its customers that such delivery will be made within a radius of 100 miles of Memphis, Tennessee, at no cost to the purchaser."

It is clear from the above stipulated facts that Rhodes-Jennings' place of business is in Tennessee, that it does not have any agents or salesmen traveling in Arkansas, that in each instance the sale to the Arkansas resident was completed in Tennessee, and that the only time Rhodes-Jennings, or any of its employees, ever entered the State of Arkansas, was when the truck of Rhodes-Jennings brought the articles into Arkansas for delivery.

The Commissioner claims that Rhodes-Jennings is liable for the Gross Receipts Tax levied by Act 386 of 1941 (Sec. 84-1901 Ark. Stats.), which is a Sales Tax Act. In *McLeod v. Dilworth,* 205 Ark. 780, 171 S.W. 2d 62, we held that sales made in Tennessee under similar circumstances were not subject to the Arkansas Sales Tax; and the Supreme Court of the United States affirmed the case in *McLeod v. Dilworth,* 322 U.S. 327, 88 L. 1304, S. Ct. . But the Commissioner now contends that the effect of the holding of the U. S. Supreme Court in *General Trading Co. v. Tax Commission,* 322 U.S. 335, 88 L. Ed. 1309, S. Ct. , and *Norton Co. v. Dept. of Revenue of Ill.,* 340 U.S. 534, 95

L. Ed. 517, S. Ct. , was to overrule the holding in *McLeod v. Dilworth;* and the Commissioner also contended that the decision of the Maryland Court of Appeals in *Miller v. Maryland* showed a broadening of State taxing power, even as regards sales tax cases.

All of the contentions of the Commissioner are answered adversely to him by the decision of the U. S. Supreme Court in *Miller v. Maryland,* U.S. , 98 L. Ed. (Adv.) 470, 74 S. Ct. 535 (Opinion of April 5, 1954), wherein *McLeod v. Dilworth* is cited, and *General Trading Co. v. State Tax Comm.* is explained. So we see no merit in any of the aforementioned contentions of the Commissioner.

Finally, and in this one case only, the Commissioner calls attentions to the following stipulated facts:

> "That plaintiff holds in escrow the sum of $1316.32 representing two per cent (2%) of the amount of said sales which is the subject of this litigation. Said purchasers made such deposits under protest, and under the express agreement between the parties that the amount so paid by them and every one of them would be held in trust by plaintiff; that plaintiff would contest the legality and validity of the Arkansas Cross Receipts Act and that the amount of such alleged tax so deposited would be returned to each and every one of them in the event it should be later determined that (1) plaintiff was not legally obligated to collect said tax, or (2) that it be held that the tax is not applicable to such sales and therefore illegal and invalid."

The Commissioner insists that the case of *Cook, Comm. v. Sears-Roebuck,* 212 Ark. 308, 206 S.W. 2d 20, is authority to prevent Rhodes-Jennings from recovering the

money paid under protest in the case at bar. But we find no merit in this contention of the Commissioner. It is stipulated that Rhodes-Jennings holds the money subject to return to its customers. When Rhodes-Jennings prevails in this case, then the customers get the return of their money. No such facts were shown in the Sears-Roebuck case, and the absence of such facts lead to the application of the doctrine of unjust enrichment in the Sears-Roebuck case. That doctrine has no application here.

We affirm the Chancery decree in favor of Rhodes-Jennings Furniture Company in the case at bar.

Case No. 210

THOMPSON, Commissioner

v.

LEO KAHN FURNITURE COMPANY

In this case, the Commissioner claims that Leo Kahn is liable to the State for Gross Receipts Tax under Act 386 of 1941 (Sec. 84-1901 Ark. Stats.), because of sales of merchandise made by Leo Kahn to residents of Arkansas. The facts were stipulated as follows:

> "Plaintiff is a corporation organized under the laws of the State of Tennessee, engaged in selling merchandise at its place of business in Memphis, Tennessee. It has not qualified to do business in Arkansas, nor does it own or maintain a place of business in this state, neither does it have agents or drummers who solicit business herein.
>
> "Plaintiff has heretofore sold merchandise to res-

idents of Arkansas, all of such sales being made in the following manner:

"(a) Residents of Arkansas come in person to place of business conducted by plaintiff in Memphis, Tennessee, and purchase and pay the consideration for certain items of merchandise, and

"(b) Residents of Arkansas use the Federal postal service or interstate telephone or telegraph service and offer to purchase from plaintiff such items of merchandise, and such offers are accepted or rejected by defendant in Memphis, Tennessee.

"That in either or all such transactions so had, the offer to buy such merchandise so made by the resident of Arkansas, and the acceptance thereof by plaintiff, was made in Tennessee, and the consideration therefor was paid in Tennessee. Thereafter, plaintiff delivered the merchandise so purchased without additional charge to the home or place of business of the Arkansas resident by its truck. Plaintiff has an established policy generally known to its customers that such deliveries will be made within a a radius of 100 miles of Memphis, Tennessee, at no cost to the purchaser . . . . ."

This is also a case involving the Gross Receipts Tax levied under Act 386 of 1941 (Sec. 84-1901 Ark. Stats.), which is a Sales Tax; and what we said in the Rhodes-Jennings case applies here.

Therefore, we affirm the decree of the Pulaski Chancery Court in favor of Leo Kahn Furniture Company.

Case No. 209

THOMPSON, Commissioner

v.

BRANYAN & PETERSON, INC.

In this case, the Commissioner claims that Branyan & Peterson, Inc., is liable to the State for the Use Tax levied by Act 487 of 1949 (Sec. 84-3101 Ark. Stats. Pocket Supplement), because of sales of merchandise made by Branyan & Peterson to residents of Arkansas. The facts were stipulated as follows:

> "Plaintiff is a corporation organized under the laws of the State of Tennessee, engaged in the business of selling wood-working machinery at its place of business in Memphis. Plaintiff is not qualified to do business in Arkansas and does not maintain a place of business or warehouse in Arkansas. All of its sales of machinery to residents of Arkansas are made in the following manner:
>
> "Plaintiff employs sales representatives who travel in Arkansas and solicit orders from residents thereof of certain machinery. If said offers be obtained, they are subject to acceptance by plaintiff in Memphis, Tennessee, and if so accepted the machinery is delivered by plaintiff to common carriers, F.O.B. Memphis, Tennessee, consigned to the Arkansas resident purchaser. The offer to purchase, the acceptance and delivery of the machinery to the common carrier is consummated in Memphis, Tennessee, where the consideration for the purchase thereof is paid. No Tennessee Sales Tax is collected on said sales."

The present case involves a Use Tax, just as was in-

volved in *Miller v. Maryland,* U.S. , 98 L. Ed. (Adv.) 470, 74 S. Ct. 535. We delayed our decision of this case until the Supreme Court of the United States decided the case of *Miller Bros. v. Maryland;* and after careful study of that opinion, we reach the conclusion that Branyan & Peterson, Inc. is liable to the State of Arkansas for the Use Tax in the case at bar, because of facts which distinguish this case from those in *Miller Bros. v. Maryland.*

It was stipulated in that case, as contained in Item 8 of the Appendix to the majority opinion, that Miller Bros. "* * * does not have, nor has it ever had, any representative, agent, salesman, canvasser, or solicitor, operating in the State of Maryland for the purpose of selling or taking any orders for tangible personal property, or delivering the same." And the opening sentence of the majority opinion says: "Appellant is a Delaware merchandising corporation, which only sells directly to customers at its store in Wilmington, Delaware."

In the case at bar, the stipulated facts show that Branyan & Peterson, Inc. employs sales representatives who travel in Arkansas and solicit orders in Arkansas; and we believe this use of traveling sales representatives is a substantial fact to differentiate the case at bar from the said holding of the Supreme Court of the United States. In *Miller Bros. v. Maryland,* we find this language in the majority opinion: "If there is some jurisdictional fact or event to serve as a conductor, the reach of the State's taxing power may be carried to objects of taxation beyond its boundaries." And in discussing the case of *General Trading Co. v. State Tax Comm.,* 322 U.S. 335, the writer of the majority opinion for the U. S. Court, in *Miller Bros. v. Maryland,* made these

very pertinent remarks, in comparing the facts in General Trading Co., with the facts in *Miller Bros. v. Maryland*:

> "That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only non-local phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales resulted from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market."

Without attempting to meticulously point out other possible distinctions between the facts in *Miller Bros. v. Maryland* and the facts in the case at bar, we hold that the quoted language above is a recognition by the Supreme Court of the United States that the regular use of traveling salesmen in the taxing State makes the seller liable for the collection of the Use Tax of the taxing State.

We therefore reverse the decree of the Pulaski Chancery Court, and remand this cause, with directions that a decree be entered in favor of the Commissioner, in accordance with this opinion.

Case No. 211

THOMPSON, Commissioner

v.

P. H. WILLIAMS

In this case the Commissioner claims that P. H. Williams is liable to the State for the Use Tax as levied by Act 487 of 1949 (Sec. 84-3101 Ark. Stats. Pocket Supp.), because of sales of merchandise made by P. H. Williams to residents of Arkansas. The facts were stipulated as follows:

> "Plaintiff is an individual citizen of Memphis, Tennessee, engaged in the business of selling explosives at his place of business in Memphis. He does not maintain a place of business or warehouse in Arkansas. All of his sales of explosives to residents of Arkansas are made in the following manner:
>
> "Plaintiff employs sales representatives who travel in Arkansas and solicit orders from residents thereof for dynamite and other explosives. If said offers be obtained, they are subject to acceptance by plaintiff in Memphis, Tennessee, and if so accepted the shipments are thereafter delivered by plaintiff without additional charge to the home or place of business of the Arkansas resident by his truck. No Tennessee sales tax is collected on these sales."

What we have said in the *Branyan & Peterson case* (No. 209), *supra,* applies with equal force in this case. The situations are in all respects identical.

Therefore, we reverse the decree of the Pulaski Chan-

cery Court, and remand this cause, with directions that a decree be entered in favor of the Commissioner of Revenues, in accordance with this opinion.

Case No. 208

THOMPSON, Commissioner

v.

FRED J. VANDEMARK COMPANY

The Commisioner claims that Vandemark is liable to the State of Arkansas for Use Tax as levied by Act 487 of 1949 (Sec. 84-3101 Ark. Stats. Pocket Supp.), because of sales of merchandise made by Vandemark to residents of Arkansas. The facts were stipulated as follows:

> "Plaintiff is a corporation organized under the laws of the State of Tennessee, engaged in the business of selling machinery in its place of business in Memphis.
>
> "(a) Plaintiff employs sales representatives who travel in Arkansas and solicit orders from residents thereof for certain machinery. If said offers be obtained they are subject to acceptance by plaintiff in Memphis, Tennessee; and if so accepted the machinery is delivered by plaintiff to common carriers, f.o.b. Memphis, Tennessee, consigned to the Arkansas resident purchaser. The offer to purchase, the acceptance, and delivery of the machinery to the common carrier is consummated in Memphis, where the consideration for the purchase thereof is also paid. . . . .
>
> "(b) In certain instances offers to purchase machinery handled by plaintiff are taken from Arkan-

sas residents by William Bigelow Robinson, of 400 Shell Street, Little Rock, Arkansas, doing business under the firm name of Bigelow Robinson Company. The offers to purchase so taken by him are in accordance with a written contract between him and plaintiff, copy of which is attached to complaint, marked Exhibit 'A' . . . . . "

The said contract between Vandemark and Robinson provides in part:

"1. Vandemark hereby authorizes Robinson to sell in the Arkansas Territory hereinafter described all of the equipment, materials, and supplies handled by Vandemark, including the Clark Equipment Co. products handled by Vandemark, as well as 'Weldbilt' equipment and other materials and supplies handled and distributed by Vandemark. The dealer franchise agreement now in effect between Clark Equipment Co., a Michigan corporation, and Fred J. Vandemark Co. is hereto attached for reference and for the purpose of acquainting Robinson with the terms thereof which are pertinent hereto . . . . .

"4. Robinson shall receive as compensation for the sales services rendered by him sixty (60%) percent of the sales commission allowed to Vandemark by the manufacturer or other supplier from whom Vandemark purchases, except in the transactions dealt with in the next section hereof.

"5. Parts for any equipment handled by Vandemark shall be sold and shipped to Robinson at the manufacturer's published list price thereof, less fifteen (15%) percent discount and f.o.b. Memphis, Tenn. Discount does not apply on parts shipped direct to customer even though ordered and invoiced by Robinson . . . . .

"6. Robinson agrees to maintain and operate a

special truck to give on-the-spot service to users of equipment sold by him under the terms hereof to users of said equipment, and agrees to render such truck services in accordance with policies prescribed by Vandemark, designed to comply with the requirements of the Clark Equipment Co. and other suppliers. . . . .

"10. All orders taken by Robinson within the said territory, except for such stock as may be carried by and in the hands of Robinson, and sold by him direct to customers, shall be taken by Robinson subject to acceptance by a duly authorized officer or agent of Vandemark, at Memphis, Tennessee.

"11. Robinson agrees to install and make 45-day and 90-day inspections and servicing of each new Clark machine delivered in said territory in accordance with the policy and instruction of the Clark Equipment Co. The said 45-day and 90-day inspections and servicings are to be made within 15 days before or after 45 days and 90 days respectively after installation. The three reports required by Clark Equipment Co. and by Vandemark upon the said installation and two inspections and servicings are to be furnished Vandemark properly made out, and upon the proper performance of said installation and inspection and servicing and the making of said reports thereon. Vandemark agrees to pay Robinson the sum of $25.00 on each machine . . . . ."

Vandemark not only employed traveling salesmen in Arkansas, as did Branyan & Peterson, Inc. in Case No. 209, but Vandemark also made a contract with an Arkansas resident (Bigelow Robinson): (a) that he maintain a salesroom in Arkansas; (b) that he maintain and operate a truck for "on-the-spot" service to equipment purchased from Vandemark; and (c) that he make 45-day and 90-day inspections of Clark machinery sold by Vandemark. Without doubt, these activities under the

Bigelow Robinson contract, brought Vandemark into the taxing jurisdiction of the State of Arkansas, under the holding of the United States Supreme Court in *Miller Bros. v. Maryland.*

We therefore reverse the decree of the Pulaski Chancery Court, and remand this cause, with directions to enter a decree in favor of the Commissioner, in accordance with this opinion.

/s/ ED. F. McFADDIN

The Chief Justice did not participate in any of these five cases.

STATE OF ARKANSAS

May Term, 1954—May 24, 1954.

IN THE SUPREME COURT

HORACE E. THOMPSON,
Commissioner of Revenues
Appellant

vs.

FRED J. VANDEMARK COMPANY,
A Tennessee Corporation
Appellee

No. 208

Appeal from Pulaski Chancery Court, First Division

This cause came on to be heard upon the transcript of the record of the Chancery Court of Pulaski County, First Division, and was argued by solicitors, on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said

chancery court in this cause, in this: The court should have held that appellee was liable for the collection of the use tax for the reasons that it maintained in Arkansas a traveling salesman, a sales room, a service truck and provided for regular inspections of the machinery sold.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, for the errors aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said chancery court with directions to enter a decree in favor of the appellant.

It is further ordered and decreed that said appellant recover of said appellee all his costs in this court and the court below in this cause expended, and have execution thereof. GRIFFIN SMITH, C. J. NOT PARTICIPATING.

May Term, 1954—May 24, 1954

HORACE E. THOMPSON,
Commissioner of Revenues
Appellant

vs.

BRANYAN & PETERSON, INC.,
A Tennessee Corporation
Appellee

No. 209

Appeal from Pulaski Chancery Court, First Division

JUDGMENT

This cause came on to be heard upon the transcript

of the record of the Chancery Court of Pulaski County, First Division, and was argued by solicitors, on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said chancery court in this cause, in this: The court should have held that the use by appellee of a traveling salesman in Arkansas makes the seller liable for the collection of the use tax of this State.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said chancery court with directions to enter a decree for appellant for the amount of the tax.

It is further ordered and decreed that said appellant recover of said appellee all his costs in this court and the court below in this cause expended, and have execution thereof. GRIFFIN SMITH, C.J. NOT PARTICIPATING.

May Term, 1954—May 24, 1954

HORACE E. THOMPSON,
Commissioner of Revenues
Appellant

vs.

P. H. WILLIAMS,
Appellee

No. 211

Appeal from Pulaski Chancery Court, First Division

JUDGMENT

(This judgment is verbatim with that of Branyan & Peterson, Inc., above.)

APPENDIX B

Section 1, Amendment 14, Constitution of the United States:

"(Citizenship—Due Process of Law—Equal Protection.)—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Subsection 3, Section 8 of Article 1 of Constitution of the United States:

"(Powers of Congress.)—The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; * * * (3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * *"

Section 5, Act 487 of Acts of General Assembly of Arkansas, 1949, page 1376:

"There is hereby levied and there shall be collected from every person in this State a tax or excise for the privilege of storing, using or consuming, within the State, any article of tangible personal property, after the passage and approval of this Act, purchased for storage, use or consumption in this State, at the rate of two (2%) per cent of the sales

price of such property. This tax will not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this State until the transportation of such article has finally come to rest within this State or until such article has become commingled with the general mass of property of this State."

Section 6 (d), Act 487 of Acts of General Assembly of Arkansas, 1949, page 1377:

"There are hereby specifically exempted from the taxes levied in this Act: * * *

"Tangible personal property used by manufacturers or processors or distributors for further processing, compounding or manufacturing; tangible personal property used for repair, replacement, or expansion of existing manufacturing or processing facilities or in creating new manufacturing or processing facilities, and tangible personal property used in the repair, replacement, or expansion of existing, or in the creation of new, facilities used for public transmission, communication, or transportation purposes."

Section 8, Act 487 of Acts of General Assembly of Arkansas, 1949, page 1378:

"Every vendor making a sale of tangible personal property directly or indirectly for the purpose of storage, use or consumption in this State shall collect from the purchaser two per cent (2%) of the sales price, and give to the purchaser a receipt therefor. The required amount of tax collected by the vendor from the purchaser shall be displayed separately upon the check, sales slip, bill, receipt or other evidence of sale."

Section 1, Public Law 509, 80th Congress, approved May 3, 1948:

"Chapter 246—Public Law 509. An Act to Amend an Act entitled 'An Act to Provide revenue from the District of Columbia, and for other Purposes,' approved July 16, 1947.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

"Paragraph lettered (h) of section 4 of title I of article I of the Act entitled 'An Act to provide revenue for the District of Columbia, and for other purposes,' approved July 16, 1947, is amended by striking out the period at the end of the paragraph, inserting a colon, and the following: 'Provided, however, That the words 'trade or business' shall not include, for the purposes of this article—

'(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

'(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no office, agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and

unincorporated businesses shall be subject to the licensing provisions in title XIV of this article. 'For purposes of this proviso, the words "agent" or "representative" shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such.' "

[redacted]

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SUPREME COURT OF THE UNITED STATES

BRANYAN & PETERSON, INC., A Tennessee Corporation; FRED J. VANDEMARK COMPANY, A Tennessee Corporation; and P. H. WILLIAMS, an Individual ..... *Petitioners*

v. No. 3338

HORACE E. THOMPSON, Commissioner of Revenues for the State of Arkansas ..... *Respondent*

STATEMENTS OF CASES

The petitioner herein has properly set out the agreed statement of facts in each of the cases before the Court. The agreed statement in the Branyan-Peterson case is found on page 8a of the Appendix; in the P. H. Williams case the agreed statement of facts is found at page 11a of the Appendix to the petition; and in the Vandemark case at pages 12a and 14a. In the Branyon-Peterson case they maintain sales representatives in Arkansas to take orders from consumers in Arkansas, and petitioner ships the merchandise by common carrier to the Arkansas consumer. No sales or use tax is paid to either State. In the P. H. Williams case the only difference is that Williams makes delivery to the Arkansas consumer in his own delivery trucks. The Vandemark Company employs an Arkansas business establishment in Little Rock to act as its sales and service representative in Arkansas, and to act as its distributor for all parts to be used in servicing any of Vandemark's machines, or of the Clark Equipment

Company, which Vandemark handles for Clark Equipment Company. This Arkansas business establishment, Bigelow Robinson, is required to make "on-the-spot-service" in connection with any items of machinery sold in Arkansas. They are required to inspect such machines within a given period (App. 14a) and to make necessary repairs in keeping with the sales agreement made by them and they receive compensations therefor. They are required to maintain a truck for "on-the-spot-service".

If the maintaining of sales representatives in Arkansas by Branyan-Peterson does not bring them within the taxing statute Arkansas is entitled to lose in their case. In the P. H. Williams case if the maintaining of sales representatives and the delivery into Arkansas in their own truck of the merchandise sold does not bring them within the taxing statutes we are entitled to lose again. As to Vandemark, they through their sales and service agent, Bigelow Robinson, maintain a place of business in Little Rock for the convenience of their customers, as other business houses in this State.

RESPONDENT'S BRIEF AND ARGUMENT

These cases were submitted to the Arkansas Supreme Court while the case of *Miller Bros.* v. *Maryland,* was pending, and which was decided by this Court on April 5, 1954 (U.S. 347 page 340), and the Arkansas Supreme Court sought to follow the reasoning in that case, and in deciding the Branyan-Peterson case, said:

> "In the case at bar, the stipulated facts show that Branyan & Peterson, Inc. employs sales representatives who travel in Arkansas and solicit orders in Arkansas; and we believe this use of traveling sales representatives is a substantial fact to differentiate the case at bar from the said holding of the Supreme Court of the United States. In *Miller Bros.* v. *Maryland*, we find this language in the majority opinion: 'If there is some jurisdictional fact or event to serve as a conductor, the reach of the State's taxing power may be carried to objects of taxation beyond its boundaries'. And in discussing the case of *General Trading Co.* v. *State Tax Comm.*, 322 U.S. 335, the writer of the majority opinion for the U. S. Court, in *Miller Bros.* v. *Maryland,* made these very pertinent remarks, in comparing the facts in *General Trading Co.*, with the facts in *Miller Bros.* v. *Maryland*:
>
> > "That was the case of an out-of-state merchant entering the taxing state through traveling sales agent to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only non-local phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between this type of active and aggressive

operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here was no invasion or exploitation of the consumer market in Maryland. On the contrary, these sales results from purchasers traveling from Maryland to Delaware to exploit its less tax-burdened selling market."

"Without attempting to meticulously point out other possible distinctions between the facts in *Miller Bros.* v. *Maryland*, and the facts in the case at bar, we hold that the quoted language above is a recognition by the Supreme Court of the United States that the regular use of traveling salesmen in the taxing State makes the seller liable for the collection of the Use Tax of the taxing State" (App. 9a-10a).

And in the P. H. Williams case they said: "What we have said in the Branyan and Peterson case (No. 209) *supra*, applies with equal force in this case. The situations are in all respects identical."

In the Vandemark case our Supreme Court said:

"The said contract between Vandemark and Robinson provides in part:

"1. Vandemark hereby authorizes Robinson to sell in Arkansas Territory hereinafter described all of the equipment, materials, and supplies handled by Vandemark, including the Clark Equipment Co. products handled by Vandemark, as well as 'Weldbilt' equipment and other materials and supplies handled and distributed by Vandemark. The dealer franchise agreement now in effect between Clark Equipment Co., a Michigan corporation, and Fred J. Vandemark Co. is hereto attached for reference and for the purpose of acquainting Robinson with the terms thereof which are pertinent hereto . . .

"4. Robinson shall receive as compensation for the sales services rendered by him sixty (60%) percent of the sales commission allowed to Vandemark by the manufacturer or other supplier from whom Vandemark purchases, except in the transactions dealt with in the next section hereof.

"5. Parts for any equipment handled by Vandemark shall be sold and shipped to Robinson at the manufacturer's published list price thereof, less fifteen (15%) percent discount and f.o.b. Memphis, Tenn. Discount does not apply on parts shipped direct to customer even though ordered and invoiced by Robinson . . . .

"6. Robinson agrees to maintain and operate a special truck to give on-the-spot service to users of equipment sold by him under the terms hereof to users of said equipment, and agrees to render such truck service in accordance with policies prescribed by Vandemark, designed to comply with the requirements of the Clark Equipment Co. and other suppliers . . . .

"10. All orders taken by Robinson within the said territory, except for such stock as may be carried by and in the hands of Robinson, and sold by him direct to customers, shall be taken by Robinson subject to acceptance by a duly authorized officer or agent of Vandemark, at Memphis, Tennessee.

"11. Robinson agrees to install and make 45-day and 90-day inspections and servicing of each new Clark machine delivered in said territory in accordance with the policy and instruction of the Clark Equipment Co. The said 45-day and 90-day inspections and servicings are to be made within 15 days before or after 45 days and 90 days respectively after installation. The three reports required by Clark Equipment Co. and by Vandemark upon the said installation and two inspections and servicings are to be furnished Vandemark properly made out, and upon the proper performance of said installa-

tion and inspection and servicing and the making of said reports thereon. Vandemark agrees to pay Robinson the sum of $25.00 on each machine . . .

"Vandemark not only employed traveling salesmen in Arkansas, as did Branyan & Peterson, Inc. in case No. 209 but Vandemark also made a contract with an Arkansas resident (Bigelow Robinson): (a) that he maintain a salesroom in Arkansas; (b) that he maintain and operate a truck for "on-the-spot" service to equipment purchased from Vandemark; and (c) that he make 45-day and 90-day inspections of Clark machinery sold by Vandemark. Without doubt, these activities under the Bigelow Robinson contract, brought Vandemark into the taxing jurisdiction of the State of Arkansas, under the holding of the United States Supreme Court in *Miller Bros.* v. *Maryland*" (App. 13a-15a).

It will thus be seen that the Arkansas Supreme Court tried to follow the decision of this Court as to liability for Use Tax on merchandise crossing state lines in commerce. One of the earliest cases found by us was decided by this Court in 1938, which is *Western Livestock, a partnership* v. *Bureau of Revenue,* 303 U.S. 250. We here quote from that case:

"It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way'."

The next important case on the question was *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U.S. 33. We here quote from that case:

"Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the

play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it . . . .

"In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed . . . .

"Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the

course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business . . . .

"The present tax as applied to respondent is without the possibility of such consequences. Equality is its theme, cf. *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 583. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event, regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce . . ."

The same day this Court decided the *Berwind-White* case it also decided the case of *McGoldrick* v. *A. H. Du-Grenier* (1940), 309 U.S. 70. In that case this Court went even further than in the *Berwind-White* case. In the *Du-Grenier* case it accepted orders from New York at its Massachusetts office, and shipped merchandise to New York consumers, at his expense, and a sales tax was upheld by this Court. Likewise in *McGoldrick* v. *Felt & Tarrant Co.* (1940), 309 U.S. 70. The head note in that case is as follows: "New York—Sales solicited and deliveries made in taxing jurisdiction.—A city sales tax may be imposed on sales which are solicited in the City and in which possession is transferred to the buyer in the city, although the orders are subject to approval at an office in another state and remittances are made to such office." That is

exactly what P. H. Williams and Vandemark do in their sales to Arkansas customers. Branyan-Peterson ship their sales by common carrier. These are the very things the Arkansas Use Tax Act was passed for. Section 31 of the Act (Act 487 of 1949) is as follows:

> "Section 31. *Emergency clause.* Since the enactment of the Arkansas Retail Sales Tax Act, Arkansas has been placed in the peculiar category of discriminating against its home merchants. This Act attempts to rectify the evil by placing domestic merchants upon an equal plane with foreign merchants . . ."

Again in the case of *General Trading Co.* v. *State Tax Com.*, 322 U.S. 335, we find an exact situation as in these cases. The Arkansas Supreme Court thought, and we think, it is controlling here. The pertinent features of the Iowa and Arkansas tax statutes are the same. We here give the Court the decision in that case:

> "The State Tax Commission of Iowa brought this suit under the authority of the Iowa Use Tax Law which was recently here in *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, and *Nelson* v. *Montgomery Ward*, 312 U.S. 373. The question now presented is, in short, whether Iowa may collect, in the circumstances of this case, such a use tax from General Trading Company, a Minnesota corporation, on the basis of property bought from Trading Company and sent by it from Minnesota to purchasers in Iowa for use and enjoyment there."
>
> (Law imposing the tax)
>
> "By the Iowa Use Tax Law a tax is 'imposed on the use in this state of tangible personal property purchased . . . for use in this state at the rate of two percent of the purchase price of such property. Said tax is . . . imposed upon every person using such property within this state until such tax has been paid directly to the county treasurer, to a re-

tailer, or to the commission. . . ." § 6943.103, Code of Iowa 1939. The use of property the sale of which is subject to Iowa's sales tax is exempted from the use tax (§ 6943.104(1)), but the sales tax can be laid only on sales at retail within the State. § 6943.-075. The use tax constitutes a debt owed by the retailer to the State. § 6943.112. But 'Every retailer maintaining a place of business' in Iowa must collect this tax from the purchaser (§ 6943.109), and may not advertise that he will himself absorb the tax. § 6943.111. Finally an off-setting credit (see *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 584, 586-7) if another use or sales tax has been paid for the same thing elsewhere is allowed, and if the tax 'imposed in such other state is two percent or more, then no tax shall be due on such articles'. § 6943.-125."

(State court decision)

"A judgment in favor of the Tax Commission by one of the lower courts was affirmed by the Supreme Court of Iowa, ... Iowa . . . , 10 N.W. 2d 659. The application by that Court of its local laws and the facts on which it founded its judgment are of course controlling here. From these it appears that General Trading Company had never qualified to do business as a foreign corporation in Iowa nor does it maintain there any office, branch or warehouse. The property on which the use tax was laid was sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post. Upon these facts and its holding that Trading Company was a 'retailer maintaining a place of business in this state' within the meaning of the Iowa statute, the Iowa Supreme Court held that Iowa had not exceeded its powers in the imposition of this use tax on Iowa purchasers, and that collection could validly be made through the Trading Company.

(Power of states to levy use taxes)

"We brought the case here, 320 U.S. 731, to meet the claim that there was need for further precision regarding the scope of our previous rulings on the power of States to levy use taxes. In view however of the clear understanding by the court below that the facts we have summarized bring the transaction within the taxing power of a State, there is little need for elaboration. We agree with the Iowa Supreme Court that *Felt & Tarrant Co.* v. *Gallagher,* 306 U.S. 62; *Nelson* v. *Sears, Roebuck & Co., supra; and Nelson* v. *Montgomery Ward, supra,* are controlling. The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine for shipment from without a State as in the *Gallagher* case, compared with the apparently simpler means for soliciting business in this case. And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance. Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock* v. *Bureau,* 303 U.S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which it may draw from a State to the upkeep of which it may be asked to bear its fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best & Co.* v. *Maxwell,* 311 U.S. 454.

> "None of these infirmities affects the tax in this case any more than it did in the other cases with which it forms a group. The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own State Government. To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co.* v. *Johnson*, 292 U.S. 86, 93-94; *Felt & Tarrant Co.* v. *Gallagher*, *supra.*
>
> Affirmed."

Relying upon these cases the Arkansas Supreme Court necessarily held that the maintaining of sales agents in Arkansas constitutes doing business in Arkansas. In its judgment found on page 16a of Appendix A of Petitioner's brief the Arkansas Supreme Court, in the Vandemark case said: "The Court should have held that Appellee was liable for the collection of the Use Tax for the reason that it maintained in Arkansas a traveling salesman, a sales room, a service truck and provided for regular inspections of the machinery sold". In the other two cases it said: "The Court should have held that the use by Appellee of a traveling salesman in Arkansas makes it liable for the collection of the Use Tax of this State". (See pages 16a and 17a of Appendix A of Petitioner's brief.)

Petitioner contends that the Arkansas Supreme Court did not pass upon the question of whether or not the lifter sold to the Canning Company was specially exempted from the liability of the tax under Section 6(d) of the Act. The Court found that petitioner (Vandemark) was liable for the tax, and that it could not recover the tax paid under protest. It reversed the lower court's decree which was

in favor of Vandemark "with directions to enter a decree in favor of the Appellant". We think that is a finding against the petitioner, both as to deductions and constitutes a holding that the Act is constitutional. They so held again when they overruled their motion for a rehearing in the cases. The Court never did say that the provisions of the Act are or are not constitutional, but the effect was to hold it as constitutional. Likewise it never said that any part of the sales were exempt or not, but the effect of the Court's judgment is that it is all taxable. It would seem that the Arkansas Supreme Court held that all sales involved are taxable sales; that none are deductible and that the Act does not offend against either the State or Federal Constitution, and that all the tax collected is due the State.

DOING BUSINESS FOR PURPOSE OF SALES AND USE TAX LIABILITY

Doing business for purposes of obtaining legal service and doing business for Sales and Use Tax liability purposes is entirely different. According to the *General Trading Company* case the only necessary activity to render one liable for Use Tax is the maintaining of sales agents in the taxing state. That decision of this Court was rendered in 1944, and the General Assembly of Arkansas in January, 1949, enacted our Use Tax Law (Act 487 of 1949), and in Section 4(d) we find the following:

> "(d) The term 'vendor' means and includes every person engaged in making sales of tangible personal property, by mail order, by advertising, by agent; or peddling tangile personal property, *soliciting or taking orders for sales of same for storage, use or consumption in this State;* and all salesmen, solicitors, hawkers, representatives, consignees, peddlers or canvassers as agents or the

dealers, distributors, consignors, supervisors, principals or employers under whom they operate or from whom they obtain the tangible personal property sold by them. Irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, principals or employers, they must be so regarded as vendors, and the dealers, distributors, consignors, supervisors, principals or employers must be regarded as vendors for purposes of this Act" (emphasis supplied).

The Act also defines "Sale" as follows in Section 4(f):

"(f) The term 'sale' means any transfer, barter or exchange of the title or ownership of tangible personal property; or the right to use, store or consume the same, for a consideration paid or to be paid, in installments or otherwise, and includes any transaction whether called leases, rentals, bailments, loans, conditional sales, or otherwise, and notwithstanding that the title or possession of said property, or both, is retained for security. *For the purpose of this Act the place of delivery of tangible personal property to the purchaser, user, storer or consumer shall be deemed to be the place of sale, whether such delivery be by the vendor or by common carriers, private contractors, mails, express, agents, salesmen, solicitors, hawkers, representatives, consignees, peddlers, canvassers, or otherwise*" (emphasis supplied).

It is presumed that the General Assembly knew of the declaration by this Court and prepared its definitions accordingly. The provision is drawn in apt language, as if copied from the Court's decisions.

CONCLUSION

P. H. Williams, a seller of dynamite and other explosives, maintains agents in this State for the purpose of effecting sales of its merchandise to Arkansas consumers. This phase of such sales is definitely covered under the requirements of the Use Tax Act in the maintaining of agents in this State and such agents are constituted or defined as vendors and they as well as P. H. Williams are liable for the tax on merchandise sold and delivered into this State, in its own trucks.

Branyan & Peterson, Inc., also maintains agents in Arkansas for the purpose of making sales. After the sale is made by the Arkansas agent, the machinery sold by Branyan-Peterson, which is wood-working machinery, is delivered by common carrier f.o.b. Memphis and the sale is made as a direct result of the maintaining of agents in this State for the purpose of effecting such sales as provided for in the Use Tax Act. The exact factual conditions existing in the case of *General Trading Co.*, as in the Branyan-Peterson case, has been thoroughly discussed heretofore.

Vandemark is a seller of heavy machinery and it has employed Bigelow Robinson, an Arkansas company, as its sales and service agent in this State as is set out in its written Agreement which is made a part of the record in this case. It also has a dealer under franchise agreement by the name of Clark Equipment Company, located in the city of Little Rock. Paragraph 7 of the agreement provides "when used equipment is taken in trade upon the sale of new equipment sold by Robinson under the terms hereof Robinson is free to take such used equipment in trade to himself at any price he may be willing to pay for same. If, however, Vandemark is to take such used

equipment in trade making an allowance therefor on such price of new equipment, only such amount may be allowed therefor as is authorized by a duly authorized officer of Vandemark and commission shall be allowed Robinson only on the amount of the sale of the new equipment in excess of such trade-in allowance." Paragraph 6 says Robinson is to maintain and operate trucks for spot service to users of equipment sold under the terms of the Agreement. The Commissioner, of course, insists that Bigelow Robinson and Clark Equipment Company are agents of Vandemark, and each of which agents maintains places of business in the State of Arkansas.

It is agreed by stipulation in each of the cases now before this Court that no Tennessee tax is paid on any of the sales involved herein. We therefore insist that under the provisions of the Use Tax Act of this State, merchandise being sold and delivered to consumers in this State comes squarely within the provisions of the taxing provisions of the Act and the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted

O. T. WARD

Counsel for Respondent

APPENDIX

Compensating or Use Tax Law of Arkansas .... Act 487 of 1949.

Sections are Found in Pocket Supplement to Arkansas Statutes 1947.

Section 84-3104:

• • • • •

"(d) The term 'vendor' means and includes every person engaged in making sales of tangible personal property, by mail order, by advertising, by agent; or peddling tangible personal property, soliciting or taking orders for sales of same for storage, use or consumption in this State; and all salesmen, solicitors, hawkers, representatives, consignees, peddlers or canvassers as agents of the dealers, distributors, consignors, supervisors, principals or employers under whom they operate or from whom they obtain the tangible personal property sold by them. Irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, principals or employers, they must be so regarded as vendors, and the dealers, distributors, consignors, supervisors, principals or employers must be regarded as vendors for purposes of this Act (§§ 84-3101—84-3128)."

• • • • •

"(f) The term 'sale' means any transfer, barter or exchange of the title or ownership of tangible personal property; or the right to use, store or consume the same, for a consideration paid or to be paid, in installments or otherwise, and includes any transaction whether called leases, rentals, bailments, loans, conditional sales, or otherwise, and notwithstanding that the title or possession of said property, or both, is retained for security. For the

purpose of this Act (§§ 84-3101—84-3128) the place of delivery of tangible personal property to the purchaser, user, storer or consumer shall be deemed to be the place of sale, whether such delivery be by the vendor or by common carriers, private contractors, mails, express, agents, salesmen, solicitors, hawkers, representatives, consignees, peddlers, canvassers, or otherwise."

Section 84-3105:

"(a) There is hereby levied and there shall be collected from every person in this State a tax or excise for the privilege of storing, using or consuming, within the State, any article of tangible personal property after the passage and approval of this Act (§§ 84-3101—84-3128), purchased for storage, use or consumption in this State at the rate of two (2%) per cent of the sales price of such property. This tax will not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this State until such article has become commingled with the general mass of property of this State. This tax shall apply to the use, storage or consumption of every article of tangible personal property, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured within the State of Arkansas or are available for purchase within the State of Arkansas, and irrespective of any other condition."

"(b) Every person storing, using or consuming in this State tangible personal property purchased from a vendor shall be liable for the tax imposed by this Act (§§ 84-3101—84-3128), and the liability shall not be extinguished until the tax has been paid to this State, but a receipt, from a vendor authorized by the Commissioner under such rules and regulations as he may prescribe to collect the tax imposed hereby, given to the purchaser in accordance with the provisions of Section 7 (§ 84-3107) of this Act

shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer."

Section 84-3107:

"(a) Every vendor selling tangible personal property for storage, use or consumption in this State shall immediately after the passage and approval of this Act (§§ 84-3101—84-3128) register with the Commissioner and give the names and addresses of all agents operating in this State, the location of any and all distribution or sales houses or offices of other places of business in this State and such other information as the Commissioner may require."

"(b) Every vendor selling tangible personal property for storage, use or consumption in this State shall furnish all agents with a statement to the effect that his principal has been and is complying with the provisions of this Act (§§ 84-3101—84-3128). (Acts 1949, No. 487, § 7, p. 1372)."

Section 84-3108:

"Vendor to collect tax.—Every vendor making a sale of tangible personal property directly or indirectly for the purpose of storage, use or consumption in this State shall collect from the purchaser two (2%) per cent of the sales price, and give to the purchaser a receipt therefor. The required amount of the tax collected by the vendor from the purchaser shall be displayed separately upon the check, sales slip, bill, receipt or other evidence of sale. (Acts 1949, No. 487, § 8, p. 1372.)"

Section 84-3110:

"Presumption—For the purpose of the proper administration of this Act (§§ 84-3101—84-3128) and to prevent evasion of the tax and the duty to collect the same herein imposed, it shall be presumed that tangible personal property sold by any

vendor for delivery in this State or transportation to this State is sold for storage, use or consumption in this State unless the vendor selling such tangible personal property shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale, and it shall be further presumed that tangible personal property shipped, mailed, expressed, transported or bought to this State by the purchaser thereof was purchased from a vendor after the passage and approval of this Act for storage, use or consumption in this State. (Acts 1949, No. 487, § 10, p. 1372.)"

Section 84-3111:

"Secretary of State to be agent for service—In all suits brought hereafter in any of the courts of this State by the Commissioner against any vendor, for any violation of this Compensating Tax Act (§§ 84-3101—84-3128), such suits shall be brought thereon in any courts of this State having jurisdiction of the subject matter. Every vendor shall designate with the Commissioner an agent for service within this State for the purpose of enforcing this Act. If a vendor has not designated or shall fail to designate with the Commissioner an agent for service within the State, then the Secretary of State shall be deemed the agent for service, or any agent or employee of the vendor, within the State, shall be deemed agent for service. (Acts 1949, No. 487, § 11, p. 1372.)"